

THE HONORABLE SHARON GLEASON

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5 UNITED STATES OF AMERICA, No. 3:16-cr-0086-SLG-DMS

6 Plaintiff,

7 vs.

8 JOHN PEARL SMITH, II,

9 Defendant.

MOTION TO COMPEL ALL NOTES
TAKEN BY THE GOVERNMENT
DURING THE INVESTIGATION

11 **I. MOTION**

12 John Pearl Smith, II, through counsel, moves to compel production of any Jencks
13 or Brady/Giglio material in prosecutors' or agents' notes of witness interview.

14 **II. ARGUMENT**

15 It is typical that, in a complex criminal trial such as this, the Government will
16 provide notes taken by agents of pretrial meetings with witnesses. The Jencks deadline has
17 passed and no notes have been provided to the defense. It is unclear whether the
18 Government's current position is that it has no obligation to turn over such notes, or
19 whether it has directed its agents not to take notes.

20 The motion is motivated by events surrounding the evidentiary hearing regarding
21 Brian Long held on June 10, 2019. Before the hearing the Government provided to
22 counsel several documents related to Mr. Long's work as a jailhouse informant. One of the
23 issues was whether Mr. Long was essentially a Government agent and whether the
24 Government had advised Mr. Long to refrain from actively questioning Mr. Smith. See

25
MOTION TO COMPEL - 1
U.S. V. SMITH, NO. 3:16-CR-0086-SLG-DMS

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1 Dkt. 458 at 117. The discovery provided to Mr. Smith not contain any information that the
2 DEA agents involved had advised Mr. Long on this point. And it contained only one DEA
3 6, by DEA Agent Fuller.

4 The night before the evidentiary hearing began, however, the Government
5 produced new information. DEA Agent Burke was also present at Mr. Long's interview
6 but he did write a DEA 6. He did, however, have handwritten notes of the interview with
7 Mr. Long. Dkt. 448 (Exhibit List). Those notes included DEA Agent Burke's notation that
8 some advisement was given.

9 This incident demonstrates that any notes taken by law enforcement, even if they
10 are never reduced to an official report, can be critical. Unlike the Alaska State Troopers –
11 who are required to audio record witness interviews - the FBI and the DEA have a policy
12 of NOT recording witness statements. Their reports are based upon notes taken during the
13 interview. The incident with Agent Burke and his notes demonstrates that all notes taken
14 during these interviews are critical. Without them, defense counsel cannot determine what
15 the Agents have left out of the final narrative in their “official” reports.

16 Under the Jencks Act, the government must produce any records from its
17 interviews with witnesses that incorporate any statement made or adopted by a witness
18 relating to a subject matter on which the witness has testified. 18 U.S.C. § 3500.¹ Under
19 *Brady* and *Giglio*, the government is required to produce any evidence “favorable to the
20

21 ¹ Statement is defined in the Jencks Act, 18 U.S.C. § 3500(e), to include:

22 (1) a written statement made by said witness and signed or otherwise adopted or
23 approved by him; [or]
24 (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof,
25 which is a substantially verbatim recital of an oral statement made by said witness and
recorded contemporaneously with the making of such oral statement[.]

1 accused, either because it is exculpatory, or because it is impeaching[.]” *United States v.*
2 *Williams*, 547 F.3d 1187, 1202 (9th Cir. 2008) (citation and internal quotation marks
3 omitted).

4 The government may not hold back either Jencks or *Brady/Giglio* material because
5 (1) the agents were not permitted to prepare notes; (2) the agents did take notes but the
6 government does not want to turn them over; or (3) the prosecutors are the only ones who
7 took notes. See *Goldberg v. U. S.*, 425 U.S. 94, 101–02, 108 (1976) (holding that the work-
8 product doctrine does not bar production of materials otherwise producible under the
9 Jencks Act); *United States v. Kohring*, 637 F.3d 895, 907 (9th Cir. 2010) (“[I]n general, a
10 prosecutor’s opinions and mental impressions of the case are not discoverable under *Brady*
11 */Giglio*] unless they contain underlying exculpatory facts.”) (emphasis added, alteration in
12 original).

13 Clearly Government agents had interviewed a multitude of witnesses in this case –
14 some have been interviewed more than one. Any written record by any government agent
15 or prosecutor from these meetings is likely discoverable under Jencks and potentially also
16 under *Brady/Giglio*. The Government should have to produce any notes from witness
17 interviews that incorporate any statements made or adopted by any witnesses or that
18 include any evidence that is exculpatory or may impeach witnesses. If necessary, Mr.
19 Smith would not object in camera review of any notes from these interviews, to enable the
20 Court to separate protected work-product from *Jencks* or *Brady/Giglio* material.

21 Respectfully submitted this 27th day of September, 2021.

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MOTION TO COMPEL - 3
U.S. V. SMITH, NO. 3:16-CR-0086-SLG-DMS

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CERTIFICATE OF SERVICE

I, SUZANNE LEE ELLIOTT, certify that on September 27, 2021, I filed foregoing document with the United States District Court's Electronic Case Filing (CM/ECF) system, which will serve one copy by email on Assistant United States Attorneys KAREN VANDERGAW, JAMES KLUGMAN and CHRISTOPHER D. SCHROEDER.

/s/ Suzanne Lee Elliott

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